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No. 88-346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

ANTHONY MINIZZA, *et al.*,
Petitioners,

v.

STONE CONTAINER CORP. CORRUGATED CONTAINER DIV. EAST PLANT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

MARSHA S. BERZON
177 Post Street, Suite 300
San Francisco, CA 94108

MARGARET A. BROWNING
260 S. Broad Street, Suite 1500
Philadelphia, PA 19102

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
202-637-5390
(Counsel of Record)

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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The respondent employers in their brief in opposition agree with the major premise of our *certiorari* petition by recognizing that "[i]n view of the prevalence of lump sum payments in collective bargaining in recent years, the issue of FLSA treatment in calculating overtime pay is . . . an important one." Brief in Opposition ("Opp. Br.") at 15. Respondents' attempt to blunt that acknowledgment, however, by maintaining that the Court of Appeals' analysis was either correct or, at least, so fact-bound as not to merit the exercise of this Court's *certiorari* jurisdiction. That attempt fails.

1. Respondents first rewrite the Court of Appeals opinion and then argue that, as rewritten, that opinion does not conflict with the Fair Labor Standards Act ("FLSA") or with the Secretary of Labor's interpretations of the FLSA.

One of the two related Questions Presented by our *certiorari* petition is whether "the 'regular rate' of compensation for purposes of calculating overtime payments under the [FLSA] includes payments to employees as compensation for services rendered, where the amount of compensation does not depend upon the precise number of hours worked or services rendered."

For the reasons stated in the petition we submit that the answer to that Question is "Yes." As we point out (Pet. 10-13 & n. 6), the opposite conclusion would be squarely contrary to Department of Labor interpretative regulations, and would lead to exclusion from the "regular rate of pay" for the calculation of overtime of all manner of payments to employees not calibrated to the *number* of hours worked or the *amount* of services provided.

Respondents do not dispute any of this; they *agree* that under the statute, there need only be "*some nexus* between services and compensation paid," and they *agree* as well that "[t]hat does not mean that the hours must be quantifiable in direct relation to the payment." Br. in Opp. at 9.

What respondents maintain, however is, that "[t]he Court of Appeals did not base its decision on the absence of a calibration or formula." Br. in Opp. at 9. In this regard, however, respondents are simply wrong: Central to the Court of Appeals opinion was its explicit statement that the lump sum payments in question cannot be "compensation for . . . hours of employment" unless "the payments [are] . . . conditioned on a certain number of hours worked or an amount of services provided." Pet. App. 12a. We fail to see how the Court of Appeals state-

ment can be accorded any meaning other than the one we have ascribed to it, or how this statement can be read to be consistent with the rule for which respondents argue.

That respondents now in effect concede that the Court of Appeals erred on this critical issue is, of course, grounds for *granting*, not for denying, the petition. Absent such review, the parties to collective bargaining agreements, and other courts, will have to take into account what the Court of Appeals erroneously stated the law to be, not what respondents now state the law to be.[1]

2. As to whether the Court of Appeals opinion states rules of law of sufficient generality to merit this Court's attention, respondents again ignore what the Court of Appeals said, as opposed to what respondents wish that court had said.

The Court of Appeals held (see Pet. 18-19), that an employer's *motive* for agreeing to a certain provision regarding payments to employees, rather than the objective characteristics of those payments, is controlling in the characterization of the payments for FLSA purposes. In this regard the Court of Appeals made a legal, not a factual, error. Pet. 18-21. And that legally erroneous analysis is the one that will be applied in later cases, absent this Court's review. That the Court of Appeals' legal analysis may lead to different results on different factual records is entirely beside the point, where that legal analysis itself is fundamentally in error.

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[1] Respondents also insist that the lump sum payments in this case were in fact not "intended to be rewards for services rendered," and therefore were not "compensation for . . . hours of employment" under the correct legal standard. The District Court, however, expressly found otherwise (Pet. App. 29a), and, as noted, the Court of Appeals applied an erroneous legal standard in overruling this finding. Moreover, where, as here, a payment is made only to employees who have been *actively* employed for a specified time period, there is obviously "some nexus" between services and compensation paid.

3. Given the Court of Appeals contrary suggestion, and respondents argument to the same effect, we emphasize that it *is not* our position that FLSA § 7(e)(2) excludes only payments made for idle hours or as reimbursements. Compare Br. in Opp. at 11; Pet. App. 11a-12a. We fully recognize that there may be payments to employees outside of those two categories that are "not made as compensation for hours of employment" and therefore should not be included in the FLSA "regular rate."

Our point, rather, is that where a lump sum payment is regarded as "wages" by the parties and expressly conditioned upon a minimum number of months of active service, the payment necessarily *is* "compensation for hours of employment" within the meaning of the FLSA. It is therefore of no consequence that the Department of Labor also recognizes that there may be lump sum payments to employees which so lack any nexus to services performed as to be excluded from the "regular rate" under § 7(e)(2). Br. in Opp. at 11, relying on October 15, 1981, Opinion Letter.[2]

Thus, the salient point for present purposes is that there is *no* Department of Labor statutory interpretation holding that cash payments to employees premised upon amount of active service are not compensation for services rendered, or come under the § 7(e)(2) exclusion.[3] To the contrary, as we have seen, the Department's promulgated regulations stress that for § 7(e)(2) purposes, the nexus between employment and compensation need not be in the form of a direct relationship between

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[2] The lump sum payments discussed in the 1981 Opinion Letter had no durational service requirement whatever. Moreover, the Department made clear that it viewed the circumstances in that case as unique, and would take a different view if such lump sum payments became (as this form of payment has become) commonplace in collective bargaining agreements. R. 26, 82.

[3] It bears noting that this does *not* mean that all such compensation is part of the "regular rate", since other subdivisions of FLSA § 7(e) may exclude the compensation from the "regular rate."

hours worked and compensation received. Moreover, the opinion letter that directly gave rise to this case explicitly states that as the Department interprets the statute, "where an employee must be on the payroll in order to receive a *future* bonus payment, the payment would be regarded as remuneration for employment which would be included in the regular rate under the Act." R. 36 (emphasis supplied); the second bonus in this case had precisely such a requirement.

There is, in short, nothing in the Department of Labor's words or logic that bolsters either the Court of Appeals' legal analysis or the result reached by that court. Instead the Labor Department's views support both our general legal position and, insofar as the Department has addressed facts analogous to those here, the precise result for which we argue in this case.

CONCLUSION

For the reasons stated above and in our *certiorari* petition, that petition should be granted.

Respectfully submitted,

MARSHA S. BERZON
177 Post Street, Suite 300
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260 S. Broad Street, Suite 1500
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